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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

STEFAN EDWARD EVANS,

Defendant and Appellant.

F056825

(Super. Ct. No. BF115835A)

**OPINION**

APPEAL from a judgment of the Superior Court of Kern County. Kenneth C. Twisselman II, Judge.

Susan D. Shors, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Louis M. Vasquez, Lewis A. Martinez, and Kathleen A. McKenna, Deputy Attorneys General, for Plaintiff and Respondent.

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## **INTRODUCTION**

Appellant/defendant Stefan Edward Evans fired multiple gunshots into an SUV, and killed one passenger and wounded two others. At trial, defendant admitted he fired into the SUV, he was associated with the Westside Crips, and that he thought the occupants were Eastside Crips. However, he claimed someone else shot at him first, he fired in self defense, and the incident was not gang-related.

Defendant was convicted of count I, first degree murder (Pen. Code<sup>1</sup>, § 187, subd. (a)), with the special circumstance that the murder was intentional, defendant was an active participant in a criminal street gang, and it was carried out to further the gang's activities (§ 190.2, subd. (a)(22)). Defendant was also convicted of counts II, III, and IV, premeditated attempted murder (§ § 664/187, subd. (a), § 189); and count V, discharging a firearm at an occupied vehicle (§ 246). As to all counts, the jury found the offenses were committed for the benefit of a criminal street gang (§ 186.22, subd. (b)). The jury found as to counts I, II, III, and V, that defendant was a principal and personally discharged a firearm in the commission of the offense which caused great bodily injury or death (§ 12022.53, subds. (d), (e)(1)); the jury found that enhancement not true as to count IV. Defendant also had one prior strike conviction (§ 667, subds. (b)-(i)), one prior serious felony conviction (§ 667, subd. (a)), and served two prior prison terms (§ 667.5, subd. (b)).

Defendant's aggregate term was life in prison without possibility of parole for count I, plus an indeterminate term of 117 years to life, and a determinate term of 21 years.

On appeal, defendant contends the court improperly permitted a police officer to testify as the prosecution's gang expert, there is insufficient evidence to support the gang

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<sup>1</sup> All further statutory citations are to the Penal Code unless otherwise indicated.

special circumstance and the gang enhancements, and that one of the firearm enhancements must be stricken. We will correct his sentence and affirm.

### **FACTS**

On August 19, 2006, Robert Jay Vandergriff, Michael Hodges, Wesley Ellison, and Preston Caldwell spent the day together, smoked marijuana, and then attended a wedding in Bakersfield. Later in the evening, the four men left the wedding in Vandergriff's blue Ford Explorer SUV, and Vandergriff drove them to an apartment complex on South Real Road because Hodges and Ellison wanted to get the drug ecstasy. Ellison had purchased drugs at the same apartment on previous occasions. When they arrived, Vandergriff parked the SUV in the apartment's adjacent lot, Ellison got out and walked to the apartment, and the three others waited in the vehicle.

On the same evening, Julia Evans (Julia)<sup>2</sup>, defendant's sister, was visiting her family in Bakersfield. Julia asked defendant if they could go to Taco Bell. Defendant agreed but said that he would drive. Julia and her young son got into her red Pontiac Grand Am, and defendant just drove around and did not take them to Taco Bell. After a while, Julia fell asleep as defendant continued to drive around.

When Julia woke up, they were parked next to a dumpster and in front of a brick wall. Defendant told Julia to wake up because she was "going to have to drive in a minute." Defendant got out of the car and walked around the dumpster and Julia lost sight of him. Julia moved over to the driver's seat and fell asleep again.

As Vandergriff and his friends waited for Ellison, Vandergriff noticed a man walk by his parked SUV and later identified that person as defendant. Vandergriff testified he had never seen defendant before that night, none of the men in the SUV were armed, and no one said or did anything to provoke defendant as he walked by.

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<sup>2</sup> For ease of reference and with no disrespect, we will refer to defendant's sister as "Julia" to avoid confusion with the defendant.

Earlier that evening, Christopher Simington parked his orange/gold car across from the same apartment complex. Simington got out of his car and talked to a woman in another car. After a few minutes, Simington looked over his shoulder and noticed a man was standing behind him. The man was wearing a powder blue shirt and he was pacing back and forth. Simington thought the man was going to car jack him. Simington and his friend decided to get back into their respective cars and leave the area.

In the meantime, Ellison purchased drugs at the apartment and returned to the SUV about three minutes after he left it. Vandergriff drove toward the parking lot's exit, stopped at the curb, and waited for traffic to clear so he could turn on South Real Road. Caldwell was sitting in the front passenger seat. Ellison was sitting on the right rear seat, and Hodges was sitting on the left rear seat.

Vandergriff looked across the street and saw Simington's orange car. Simington was sitting "outside on top of his window" and waving his hands back and forth. Ellison also noticed the orange car parked "in the middle of the street" and that Simington was "hanging out the window, waving his arms." Ellison was "tripping off" about the orange car because he thought it posed a possible threat to them.

Vandergriff returned his attention to traffic so he could pull out of the parking lot, and he suddenly heard about six gunshots and immediately "hit the gas." Vandergriff looked back toward the sound of the gunshots and saw "the guy standing there, shooting," and "fire coming out of a gun." Ellison testified he heard the gunshots within a few seconds after he noticed the orange car. Ellison testified the gunshots were fired from the left side of the SUV, where Hodges was sitting. Ellison looked to his left and saw the gunman standing just two feet from the SUV, standing in the vehicle's window. Ellison recognized the gunman as defendant because they had attended the same junior high school.

Simington testified he was about to drive away from the area, but he was still concerned about the man in the blue shirt. Simington stopped in the middle of the street,

leaned out his window, and asked the man in the blue shirt whether he was there to “fuck with me” or “are you coming for me?”” As Simington asked the question, he noticed a blue Ford Explorer with several people inside, and the SUV’s headlights distracted him. He did not recognize the occupants or see anyone get out of the SUV.

As Simington looked at the SUV, the man in the blue shirt responded to Simington’s question. The man said no and added, “I came for them.” The man turned away from Simington and quickly fired multiple shots into the Ford Explorer. Simington said the gunman “basically stuck the gun in their car.” The gunman ran away and Simington quickly drove away from the area but flagged down the police and reported what he had just seen.

In the meantime, Julia was still sleeping in the driver’s seat of her car and waiting for defendant. She woke up when she heard someone yell “[a]re you here for me?” or something to that effect.” Julia heard eight or nine gunshots fired at one time, and she grabbed her son and ducked. After the shots were fired, defendant ran back to the car and got in. Defendant told Julia “that they were shooting at him and to get away.” Defendant did not say that he fired the gun.

Vandergriff was shot in the arm and suffered some permanent loss of use. Ellison was shot in the stomach and the bullet went into his liver. Hodges, who was sitting in the left side of the backseat, was shot twice in the head and once in the neck. Caldwell jumped out of the SUV’s front passenger seat and ran away as the shots were fired, and he was not wounded.

Vandergriff drove away from the apartment complex but stopped for Caldwell, who was running behind the SUV. Caldwell got back into the SUV and took over driving because Vandergriff was in too much pain. They called 911 and Caldwell drove them to the hospital.

Hodges later died from the three gunshot wounds which penetrated his head, brain, and neck. The bullets were fired from left to right, front to back, and in a downward direction, which meant Hodges might have been hunched over when he was shot.

A neighbor who lived on South Real Road heard multiple gunshots that night. She looked out her window and saw two men hiding behind a vehicle. The men looked into the direction from where the gunshots had been fired, got into the car and drove away. The neighbor called 911 and reported the shooting.

Julia drove defendant away from the area of the shooting, and defendant told her to head to a friend's house near the Lowell Street Park.<sup>3</sup> Julia testified that as she drove away, defendant called someone on her cell phone and said, "East down alright cuz' bye." A police car appeared behind the car and attempted to conduct a traffic stop. Julia testified that defendant threw a gun out of the car window just before she stopped for the police. Julia testified the day before the shooting, she saw defendant get a gun from his friend, "Little Diesel."

Around 9:00 p.m., Bakersfield Police Officer Chris Dalton performed a traffic stop on Julia's car because it matched the description of the gunman's vehicle. Defendant, Julia, and Julia's young son were in the car. Defendant was wearing a blue shirt, blue jeans, and blue and white shoes when he was arrested.

The police interviewed Julia's five-year-old son, J.L., on the night of the shooting. J.L. told the police that defendant threw a gun out of the car just before they stopped. Based on the boy's information, the officers found a .38-caliber revolver at the exact location he described, about 500 yards away from the traffic stop. J.L. also told the officers that defendant pulled the gun out of the car "and then they start[ed] shooting."

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<sup>3</sup> As we explain, *post*, the prosecution's gang expert testified the area around Lowell Street Park was the stronghold for the Westside Crips.

J.L. said he saw two guys wearing masks who were shooting, and defendant got in the car and told them to go. J.L. said he looked back and saw ten guys shooting.

A spent hollow-point bullet was found inside Vandergriff's SUV, and tests determined it had been fired from the .38-caliber revolver recovered that night. A copper jacket and bullet fragments recovered from Hodges's brain had markings consistent with being fired from the same .38-caliber revolver. There were particles of gunshot residue on defendant's left palm and the back of his right and left hands.

There were no weapons found inside Vandergriff's SUV and no evidence that a weapon was fired from inside the SUV. However, the police did not retrace the SUV's route to look for weapons on the road, and the victims' hands were not tested for gunshot residue.

At trial, both Vandergriff and Ellison identified defendant as the gunman. While Ellison had gone to junior high school with defendant, Ellison testified they were not friends or rivals in school. Simington testified he could not identify defendant as the gunman and denied that he identified defendant the night of the shooting. Simington was impeached by his prior statement, in which he identified defendant as the gunman at an in-field showup on the night of the shooting.

Ellison's cell phone had photographs of Ellison and Hodges throwing Eastside gang signs. Ellison admitted there were "[q]uite a few" members of his family who were members of the Eastside Crips, but insisted he was not a gang member.

After defendant was arrested, defendant called Julia from the jail and the conversation was tape-recorded. Defendant told Julia that it was important for her to say that she heard eight or nine shots fired that night because "there's no way I could have been the only one shooting if you heard eight or nine shots and the witnesses saying they heard about that many." Defendant told Julia that she and her son should say "that when I got in the car I said 'they were shooting at me,' and you could kind of see them shooting at me." Defendant continued: "And because, I'm telling you it was self defense," and

“they need to know that because what I really want to do is get ‘em to, you know that it’s self defense and it wasn’t intentional.”

Defendant told Julia not to blame herself because she said something but that “it could have went better,” and he wished Julia had claimed her right to remain silent. Defendant also told Julia to tell the truth if she was questioned again, that she was half asleep but she still saw something, and “they can’t cross-examine your son” because he was a kid.

Defendant also called his cousin, Johnny Jenkins, from jail and the conversation was tape-recorded. Defendant told Jenkins it looked bad, and his sister “fucked up and told them that I called somebody. So I just told them that I called you and told you not to go around there because . . . I didn’t want you around there.”

### **The prosecution’s gang evidence**

The parties stipulated that the Westside Crips was a criminal street gang as defined by section 186.22.

Bakersfield Police Officer Mason Woessner testified as the prosecution’s gang expert.<sup>4</sup> Woessner had been a member of the police department for nine years and with the gang unit for 14 months. He received training as to gang recognition, investigation, and suppression. When Woessner was assigned to a patrol unit, he worked on the east side of Bakersfield and had regular contact with gang members.

Woessner testified he had about eight hours of formal gang training at the police academy and about one hour of that training addressed the Westside Crips. He received training in gang activities from the Bakersfield Police Department, the district attorney’s

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<sup>4</sup> As we will discuss in issue I, *post*, defendant contends Woessner was not qualified to testify as the prosecution’s expert. The court held an extensive pretrial evidentiary hearing and found he was qualified to testify as a gang expert. Defense counsel lodged continuing objections to Woessner’s trial testimony based on hearsay and lack of foundation.

office, and the California Gang Investigations Association, but those programs did not specifically address the Westside Crips. Woessner also attended state-wide gang conferences.

Woessner testified there were 1500 to 2000 criminal street gangs in California. He attended state-wide gang conferences which addressed general themes which applied to most gangs, rather than specific instructions about particular gangs like the Westside Crips.

As a member of the gang unit, Woessner investigated crimes committed by gang members, and talked to gang members “to glean information from them regarding recent activities, activities involving gang members . . . .” Woessner also worked with at-risk youth who were gang members, engaged in casual conversations with them about their activities, and personally observed tensions between rival gang members who participated in the program. These activities regularly brought Woessner into contact with members of the Westside Crips.

Woessner conducted criminal investigations into the activities of the Westside Crips, served search warrants, and investigated weapons charges, shootings, and narcotics sales. Woessner testified that members of the police department’s gang unit also worked with the sheriff’s department, probation department, and parole officers to monitor gang activities.

Woessner testified the African-American gangs in Bakersfield were the Westside Crips and Eastside Crips. Woessner had personal contact with more than 30 members of the Westside Crips. While Crips gangs were generally on the same side, the Westside Crips and Eastside Crips were at war at the time of the shooting in this case, and continued to be at war at the time of trial. The Westside Crips claimed the area around Lowell Park, also know as Sixth Street Park, and the area was considered a “central hub” and safe area for the Westside Crips.

Woessner testified that members of the Westside Crips claimed the colors turquoise and black, they used hand signals to identify themselves by showing four fingers as a “W,” and there were cliques within the gang which included the Turc Rag and 6th Street Park Crips, also known as the Lowell Park Crips.

Woessner testified the primary activities of the Westside Crips were murder, illegal drug sales, and weapons violations. One of the main ways for a gang member to gain respect and fear within the gang and among rivals is to commit a shooting against either a random individual or a rival gang member.

Officer Woessner testified he learned about defendant’s activities through law enforcement reports and jail records and discussions with other police officers and gang members. Prior to this case, defendant was contacted by the police on numerous occasions when he was with other members of the Westside Crips and told officers that he joined the Westside Crips when he was in seventh grade. His gang monikers were “Baby Bru” and “Teflon,” because criminal charges never seemed to stick to him. During a parole search of defendant’s apartment, the officers found a photograph of defendant with Westside gang slogans written on it.

Woessner testified that defendant claimed membership in the Westside Crips when he was booked into jail in March and July 2004 and June and July 2005. He again claimed membership in the Westside Crips when he was arrested in this case in August 2006. Defendant’s had numerous tattoos which used words, phrases, and numbers to represent the Westside Crips and the subset gangs of Lowell Park and 6th Street. He also had an “X” through the letters “ES,” which showed disrespect to the Eastside Crips. Woessner testified defendant’s other tattoos included a semi-automatic handgun and the phrases “Young BG Hogg,” “Baby Hoggz,” and “Gone in the head, no screws,” all of which meant “this is an individual within that gang who is willing to do work for that gang” by committing crimes. “Baby Hoggz” was a phrase only used by the Westside Crips.

In June 2002, defendant was arrested with other members of the Westside Crips for fighting in public in Westside territory. In September 2002, defendant was arrested in Westside territory while in possession of a stolen firearm and admitted he was a Westside Crip. In January 2004, defendant was arrested during an undercover investigation into narcotics sales in Westside territory. A few months later, defendant was arrested while in a vehicle with a firearm. In 2005, defendant and a companion were stopped for speeding, and they were arrested because officers found two firearms and ski masks in the car. Defendant pleaded guilty in that case to being an active participant in a criminal street gang in violation of section 186.22.

Officer Woessner testified as to his opinion that defendant was a member of the Westside Crips on the day of the shooting based upon the information and evidence he had discussed in his testimony. The prosecutor asked Woessner about the significant factors he relied upon to determine that defendant was a member of the Westside Crips on the day of the shooting. Woessner testified:

“Just involving this case, referring to his association with the gang, basically the shooting itself kind of stands on its own as being one of the primary activities involving the Westside Crips. Again, a shooting such as this not only bolsters the status or the respect level of the individual. It bolsters the status of the gang, the whole gang itself. In doing that, it creates fear amongst other gangs that members of that particular gang, this being the Westside Crips, are willing to go to these extremes to commit violent acts in the name of their gang to further that gang’s status here in our city.”

Woessner also cited to evidence of defendant’s membership in the Westside Crips based on Julia’s testimony, that defendant obtained the gun from Clarence “Little Diesel” Wandick, a known member of the Westside Crips; defendant told Julia after the shooting to drive toward Lowell Park, the “central hub” for Westside activities; and defendant called someone after the shooting and said “East down,” which meant that defendant believed he shot or badly hurt a member of the Eastside Crips. Woessner testified

defendant made that call immediately after the shooting to let someone know what he had done for the gang and to gain respect.

Based on a hypothetical question, which mirrored the facts of this case, Woessner testified that such a shooting would have been performed by a member of the Westside Crips for the benefit of his gang to bolster the gang's respect and fear among other gangs.

On cross-examination, Woessner testified he did not have personal knowledge about defendant's motives or intentions. Woessner testified that even if someone else fired first, and the gunman returned fire, the act of firing back would still benefit the Westside Crips under the circumstances.

### **Defense Evidence**

J.L., Julia's son and defendant's nephew, testified for the defendant. J.L. was five years old on the night of the shooting and seven years old at trial. J.L. testified he remembered the shooting and talked about it with his mother and knew that some people shot at defendant. J.L. testified the shooters were inside a car and he saw something white when the shots were fired. J.L. also remembered that defendant threw a gun out of the car.

Defendant testified at trial that he grew up on the west side of Bakersfield, his mother went to prison when he was 11 years old, and defendant earned money for his family by selling drugs. Defendant had been shot and wounded three times, and he had been shot at over 30 times in random incidents. Defendant did not report the incidents because he did not want to be separated from his family or be considered a snitch.

Defendant admitted he was once a member of the Westside Crips, he had been trying to leave the gang, and "[i]t's not as easy as you may think it is . . . ." He still felt loyalty and love for his friends and fellow gang members, and he claimed Westside for his own safety when he was in jail. Defendant conceded he had a tattoo of a semi-automatic handgun but claimed the tattoo depicted his uncle's favorite hunting weapon.

Defendant testified that on the evening of the shooting, he and his sister were driving around and he went to the apartment on South Real Road to buy ecstasy. He pulled into the alley and parked, but he was not sure which apartment to go to. He called his cousin, Johnny Jenkins, to confirm the drug dealer's location but his cousin did not answer the call. Defendant woke up his sister and told her to get into the driver's seat because he planned to get high once he bought the ecstasy. Defendant was wearing a powder-blue shirt but testified the Westside Crips claimed turquoise and he was not wearing gang colors.

Defendant walked through the alley, stood around for awhile, and paced back and forth. He walked toward South Real Road, went around the apartment building, and could not find the right place to buy drugs. He saw someone walk to a particular apartment door and figured that was the place. Defendant did not follow that person because he was trying to be careful at a "drug spot." Defendant eventually went to the same door and knocked but no one responded. Defendant went back to his car and asked his sister whether his cousin had called back, but there was no message.

Defendant decided to return to the apartment and buy the drugs. He passed Simington in his orange car, and recognized him from a prior encounter. Simington made eye contact with defendant and said, "[W]hat's up, nigger, you looking for me?" As a result of Simington's comment, defendant prepared for a challenge and focused on Simington. Defendant then noticed a group of people arrive in an SUV. One person got out of the SUV, and defendant did not notice anyone wearing gang colors. Defendant heard a gunshot and saw a gun flash from the SUV.

Defendant testified he fired his own gun in self-defense after he saw the gunflash from the SUV. Someone got out of the SUV and ran towards him. Defendant tried to fire at that person but he froze. Defendant turned around and ran back to his own car. Defendant told his nephew to get down and told his sister that someone was shooting at him and he did not know why.

Defendant told his sister to drive toward Lowell Park because he knew they would be safe among his friends and fellow gang members. Defendant admitted he again called his cousin, Jenkins, and told him not to meet him at the apartment, that someone shot at him, and “I thought they was from Eastside.” Defendant admitted that he thought he was shooting at Eastsiders that night.

Defendant testified he threw the gun out of the car when he realized they were being followed by the police. Defendant admitted that when he initially spoke to the police, he lied and said he was not at the apartment complex, and he changed his story numerous times because he did not want to incriminate himself or anyone else. Defendant testified he eventually decided to tell the truth to the police because an officer said that his sister was in the middle of everything, and he told the police what happened so they would release his sister. He repeatedly tried to tell the officers that someone else shot at him but they did not want to hear that. Defendant testified he did not get the gun from “Little Diesel,” but instead obtained it earlier that day, from the trunk of a parked car in the territory of the Westside Crips.

Defendant was convicted of count I, first degree murder of Hodges, with the special circumstance that the offense was committed for the benefit of a criminal street gang. Defendant was also convicted of counts II, III, and IV, the premeditated attempted murders of, respectively, Vandergriff, Ellison, and Caldwell, count V, discharging a firearm at an occupied vehicle, and that the offenses were committed for the benefit of a criminal street gang.

## **DISCUSSION**

### **I. Officer Woessner was qualified to be the prosecution’s gang expert.**

Defendant contends the trial court improperly found Officer Woessner was qualified to testify as the prosecution’s expert about criminal street gangs and the Westside Crips. Defendant argues Woessner lacked sufficient experience dealing with

gang in general, and the Westside Crips in particular, and the court should have granted his objections to exclude Woessner's testimony.

The court conducted an extensive pretrial hearing as to Woessner's qualifications and proposed testimony, and Woessner repeated much of this testimony at trial. The entirety of the record refutes defendant's contentions and the trial court did not abuse its discretion when it found Woessner was qualified as an expert.

**A. Pretrial hearing**

Prior to trial, the prosecution designated Officer Woessner as its gang expert and moved to admit his testimony to prove the gang special circumstance and enhancements. Defendant filed a motion in limine to limit and clarify the nature of the prosecution's gang evidence and requested an evidentiary hearing as to Woessner's qualifications as an expert.

At the pretrial evidentiary hearing, Woessner testified he had been with the Bakersfield Police Department for nine years and had been assigned to the gang unit for a little over one year. He received eight hours of training in gang awareness when he attended the police academy. He later attended classes presented by the California Gang Investigators Association, the California Correctional Institute Gang Intelligence Office, the Orange County Sheriff's Department, the Central Valley gang forum, and additional training at the Bakersfield Police Department.

Woessner testified he spent most of his career as a patrol officer on the east side of Bakersfield, and he had regular contact with known members of the Westside Crips, investigated crimes committed by them, and arrested gang members. He had daily contacts with the Westside Crips after he joined the gang unit. Woessner testified that "we've found" the territory of the Westside Crips to be between California Avenue, Belle Terrance, H Street, and Union Avenue. The Eastside Crips, Bloods, and Country Boy Crips were the rivals of the Westside Crips.

Defense counsel objected to Woessner's testimony as lacking foundation, hearsay, and violating the Sixth Amendment because he referred to nameless "theys" without providing any specific basis for his opinions. The court overruled the objections because the prosecutor was in the process of establishing Woessner's expertise, and those areas were subject to cross-examination. The court advised the prosecutor that it was unclear who Woessner was referring to when he said "'we.'"

The prosecutor asked Woessner to clarify who he was referring to in his earlier answer. Woessner testified he was talking about members of the gang unit, but he also had personal knowledge of the facts about the Westside Crips and their territory.

As the hearing continued, Officer Woessner testified that "[s]ome of the primary activities [of the Westside Crips] would be weapons violations, murder, narcotics sales, assaults with deadly weapons, as well as threats." Defense counsel objected to the testimony as lacking foundation. The court advised the prosecutor that he was getting into Woessner's opinion prematurely and had only "scratched the surface" as to his expertise.

The prosecutor asked Woessner about his training and personal experience with the Westside Crips. Woessner testified that he talked to other officers and members of the Westside Crips about the gang's activities, reviewed police reports and conducted investigations, and gained personal knowledge of the gang's activities when he patrolled areas that were controlled by the Westside Crips and spoke to gang members and citizens. Defense counsel again objected because Woessner failed to clarify the source for his information. The court overruled the objection but noted the defense's continuing objections to Woessner's testimony.

Woessner testified he personally engaged in the service of arrest and search warrants for members of the Westside Crips, attended and conducted formalized interviews with gang members, regularly followed the activities of the Westside Crips as part of his job assignment, and formed an understanding of their lifestyle and culture.

The prosecutor asked for examples of the gang's primary activities. Woessner testified he had reviewed a threat report involving H.C. Bryant, a known member of the Westside Crips, who joined with other members of the Westside Crips to threaten and beat another person.

Defense counsel again objected for lack of foundation and multiple hearsay and complained he never received a report about this incident. The prosecutor replied that he was trying to show the Westside Crips was a criminal street gang and lay the foundation for Woessner's opinions, defense counsel had objected and demanded specific information, but complained that defense counsel objected again and claimed the information was inadmissible as hearsay, whereas an expert could rely upon hearsay to form an opinion. Defense counsel replied that such hearsay had to be reliable, and Woessner failed to establish the reliability of the information.

The court acknowledged that defense counsel kept raising foundational objections before the prosecutor had a chance to establish the foundation for Woessner's opinion, but that defense counsel also objected to Woessner's specific testimony. The court directed the prosecutor to provide defense counsel with the report about the Bryant incident and noted defendant's continuing objections to Woessner's testimony.

The prosecutor asked Woessner if he believed the Westside Crips engaged in a continuing pattern of criminal conduct, based on his conversations with gang members, community members, and other officers. Defendant objected for multiple hearsay, leading the witness, lack of foundation, and inadmissible testimonial evidence under the Sixth Amendment and *Crawford v. Washington* (2004) 541 U.S. 36 (*Crawford*). The court again overruled the objection but deemed it a continuing objection to Woessner's testimony.

The prosecutor asked Woessner if, "based on those same conversations and contacts," whether it was common knowledge to members of the community and gang members that the Westside Crips are engaged in a continuing pattern of criminal conduct.

Defendant again raised foundational and hearsay objections, and the court again overruled the objections because the prosecutor was still trying to qualify Woessner as an expert. The court stated that it would first determine whether Woessner was qualified as an expert and then determine whether Woessner's proposed testimony was prejudicial under Evidence Code section 352.

Defense counsel conducted voir dire as to Woessner's qualifications. Woessner testified that in his academy training about gangs, he learned there were about 26 gangs in Bakersfield, and the course focused on the 10 major gangs in the area, which included the Westside and Eastside Crips. Woessner listed the other major gangs and their territorial areas in Kern County. Woessner had been in the gang unit for 14 months, he had received one hour and twenty minutes of formal training on the Westside Crips, and he conceded the statewide courses did not address the Westside Crips. Woessner had not written any publications about Bakersfield gangs or the Westside Crips, but he recently conducted the academy's eight-hour course on gangs.

On redirect examination, the prosecutor asked Woessner to further explain his experience about the gangs. Woessner testified the local gangs were defined by ethnic groups and territorial claims. Based on his experience and training, he learned about the similarities and differences between the customs, practices, and organization of the Westside and Eastside Crips.

At the conclusion of Woessner's testimony, defense counsel argued Woessner was not qualified as an expert because he had extremely minimal training in and out of the classroom. Counsel argued the law contemplated "some real experience" and training, "and not just a casual foray" into being a member of the gang unit. The prosecutor replied Woessner personally investigated and interviewed members of the Westside Crips, conducted arrests, served search warrants, and made casual contacts with gang members, which was sufficient to establish his expertise.

The court overruled defendant's objections and found Woessner met "those minimum requirements that would allow the Court to find that he does have special knowledge as a result of his experience, training, and education which is sufficient to qualify him as an expert both on the subject of criminal street gangs and specifically on the subject of the Westside Crip gang in the area of Bakersfield." The court acknowledged that defense counsel was going to make continuous objections to Woessner's trial testimony for lack of foundation, multiple hearsay, and violation of his Sixth Amendment rights.

The court continued with the evidentiary hearing to determine the admissibility of Woessner's testimony as to the activities of the defendant and the Westside Crips. Woessner's testimony was similar to his subsequent trial testimony, as set forth *ante*.

At the conclusion of the hearing, the court stated it had heard many trials involving gang allegations, and "it would certainly be appropriate for an expert in this type of a case to express an opinion consistent with what [the prosecutor] just described and then to explain in what way such a crime would further the activities of the criminal street gang. And as long as you are not objecting to that, then they don't have to use the word 'motive.'" Defense counsel objected to any testimony about defendant's alleged motive, but he did not have a problem if the prosecutor asked a proper hypothetical question based on evidentiary support for "each prong of the hypothetical."

The court again found Woessner was qualified to testify as an expert on criminal street gangs and render an opinion based on a hypothetical question as to whether the alleged offenses were carried out to further the activities of a criminal street gang. The court acknowledged defense counsel reserved the opportunity to make further specific objections during Woessner's trial testimony.

**B. Defendant's trial objections.**

As set forth *ante*, Officer Woessner testified before the jury as the prosecution's gang expert on the Westside Crips. As Woessner described his experience and education,

defense counsel objected and argued Woessner was not qualified to testify as an expert. The court permitted defense counsel to voir dire the witness in front of the jury. The prosecutor also conducted voir dire, and Woessner testified about his training as set forth in the factual statement, *ante*.

The court overruled defendant's objections and instructed the jury that it found Woessner was qualified to give expert testimony on the subject of criminal street gangs, including specifically the Westside Crips. The court acknowledged defendant's continuing objections to Woessner's testimony. As Woessner testified at trial, defense counsel lodged additional objections for hearsay and lack of personal knowledge, and the court overruled the objections and advised the jury that an expert could rely on hearsay in forming his opinions. After Woessner completed his testimony and the jury was excused, the court noted that defense counsel repeatedly raised hearsay, foundational, and Sixth Amendment objections to his testimony, and the court overruled all the objections.

### **C. Analysis.**

#### **The expert witness's qualifications**

Defendant contends the court improperly overruled his objections to Woessner's qualifications as the prosecution's expert on the Westside Crips. "According to Evidence Code section 801, subdivision (a), expert opinion testimony must be '[r]elated to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact ....' Further, '[a] person is qualified to testify as an expert if he has special knowledge, skill, experience, training or education sufficient to qualify him as an expert on the subject to which his testimony relates. Whether a person qualifies as an expert in a particular case, however, depends upon the facts of the case and the witness's qualifications. [Citation.] The trial court is given considerable latitude in determining the qualifications of an expert and its ruling will not be disturbed on appeal unless a manifest abuse of discretion in [*sic*] shown. [Citations.].' [Citation.] This court may find error

only if the witness ‘*clearly lacks* qualification as an expert.’ [Citation.]” (*People v. Singh* (1995) 37 Cal.App.4th 1343, 1377, italics in original.)

“It is well settled that a trier of fact may rely on expert testimony about gang culture and habits to reach a finding on a gang allegation. [Citation.]” (*In re Frank S.* (2006) 141 Cal.App.4th 1192, 1196 (*Frank S.*)). The subject matter of the culture and habits of street gangs meets the criteria for the admissibility of expert opinion because such evidence is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact. (*People v. Gardeley* (1996) 14 Cal.4th 605, 617 (*Gardeley*); *Frank S., supra*, 141 Cal.App.4th at pp. 1196-1197.)

Defendant argues the trial court abused its discretion when it found Officer Woessner was qualified to testify as the prosecution’s gang expert. Defendant complains Woessner had extremely minimal training and “unspecialized experience—without any recognized academic or professional credential” about gang culture and activities, he had no academic degree or professional license, and he had not been credentialed as an expert “by any recognized and neutral third party.” However, there is no requirement for an officer to possess an academic or professional credential to qualify as a gang expert, and the foundation for an officer’s opinion may be based on the officer’s experience with “street gangs in general.” (*People v. Olquin* (1994) 31 Cal.App.4th 1355, 1370.) Law enforcement officers have been found qualified to provide expert testimony regarding gangs simply based on their investigative experience. (*People v. Williams* (1997) 16 Cal.4th 153, 196; see also *People v. Ochoa* (2001) 26 Cal.4th 398, 438, abrogated on other grounds as stated in *People v. Coombs* (2004) 34 Cal.4th 821, 860 [a detective with relevant training may furnish expert opinion concerning the gang-related significance of the defendant’s tattoo]; *Gardeley, supra*, 14 Cal.4th at p. 617; *People v. Martinez* (2003) 113 Cal.App.4th 400, 413-414 [an expert properly testified that a gang ordinarily will exact revenge upon a gang member who reveals gang confidences as motive and intent for crime]; *People v. Gonzalez* (2006) 38 Cal.4th 932, 949, fn. 4 [veteran deputy sheriff

properly qualified as gang expert based on personal experience dealing with gangs, field work, and conversations with gang members about their activities and culture].)

At the pretrial evidentiary hearing, defense counsel repeatedly objected to Woessner's testimony as lacking foundation, renewed those objections during trial, and contends on appeal that Woessner lacked sufficient investigative experience to testify as an expert. However, the entirety of Officer Woessner's testimony established his qualifications to testify as an expert on criminal street gangs and the Westside Crips. He received instruction about the Westside Crips, attended numerous courses on gang activities, he had regular contact with the Westside Crips and other gang members during his nine years as a patrol officer, had daily contacts with gang members during his 14 months in the gang unit, he investigated crimes committed by the Westside Crips, served arrest and search warrants, reviewed law enforcement reports about the gang's activities, and spoke with members of the Westside Crips either through formal investigative interviews or casual contacts.

Defendant complains Officer Woessner's opinions were based on "vague speculation arising from mere hearsay," and presented "without attribution to the source of the information or upon pure speculation derived from 'reports.'" However, "[e]xpert testimony may be founded on material that is not admitted into evidence and on evidence that is ordinarily inadmissible, such as hearsay, as long as the material is reliable and of a type reasonably relied upon by experts in the particular field in forming opinions. [Citation.] Thus, a gang expert may rely upon conversations with gang members, his or her personal investigations of gang-related crimes, and information obtained from colleagues and other law enforcement agencies. [Citations.]" (*People v. Duran* (2002) 97 Cal.App.4th 1448, 1463-1464; *People v. Ruiz* (1998) 62 Cal.App.4th 234, 241-242, fn. 3; *People v. Thomas* (2005) 130 Cal.App.4th 1202, 1209-1210.) "So long as the threshold requirement of reliability is satisfied, even matter that is ordinarily inadmissible

can form the proper basis for an expert's opinion testimony.” (*Gardeley, supra*, 14 Cal.4th at p. 618.)

In *Gardeley, supra*, 14 Cal.4th 605, the court held an officer properly testified as an expert about the nature and activities of the Family Crip gang, based on the officer's opinions which were formed from “conversations with the defendants and with other Family Crip members, [the officer's] personal investigations of hundreds of crimes committed by gang members, as well as information from his colleagues and various law enforcement agencies.” (*Gardeley, supra*, 14 Cal.4th at p. 620.)

In *People v. Gamez* (1991) 235 Cal.App.3d 957 (*Gamez*) (disapproved on another ground in *Gardeley, supra*, 14 Cal.4th at p. 624, fn. 10), the court rejected the defendant's argument that a gang expert's testimony was based on unreliable hearsay from unidentified sources. *Gamez* found an officer was properly permitted to testify as an expert because his opinions were based on “personal observations and experience, the observations of other officers in the department, police reports, and conversations with other gang members,” together with photographs of the defendant throwing gang signs, his prior contacts with the police while in the presence of other gang members, his prior admissions of being a member of the gang, and his gang graffiti on textbooks. (*Gamez, supra*, 235 Cal.App.3d at p. 967.) *Gamez* further observed: “We fail to see how the officers could proffer an opinion about gangs, and in particular about gangs in the area, without reference to conversations with gang members. While the credibility of those sources may not be beyond reproach, nevertheless . . . ‘[t]he variation in the permissible bases of expert opinion is unavoidable in light of a wide variety of subjects upon which such opinion can be offered.’ [Citation.] To know about the gangs involved, the officers had to speak with members and their rivals. Furthermore, the officers did not simply regurgitate that which they had been told. Rather, they combined what they had been told with other information, including their observations, in establishing a foundation for their opinions. The statements of gang members, which in part formed the bases of the

officers' opinions, were not recited in detail during the officers' testimony but were referenced in a more general fashion, along with other, corroborating information.” (*Gamez, supra*, 235 Cal.App.3d at pp. 968-969.)

As explained in *Gamez*, *Gardeley*, and *Duran*, the trial court in this case properly overruled defendant's numerous foundational objections to Woessner's testimony. Woessner properly relied upon his review of police reports, conversations with gang members and fellow officers, and his own personal experiences as a member of the gang unit and a patrol officer for nine years, in testifying about his opinion regarding the activities of the Westside Crips and defendant's membership and activities in support of that gang.

### **Hearsay**

The trial court also properly overruled defendant's hearsay objections to Woessner's testimony, based on alleged violations of his Sixth Amendment rights pursuant to *Crawford*. “*Crawford* does not undermine the established rule that experts can testify to their opinions on relevant matters, and relate the information and sources upon which they rely in forming those opinions. This is so because an expert is subject to cross-examination about his or her opinions and additionally, the materials on which the expert bases his or her opinion are not elicited for the truth of their contents; they are examined to assess the weight of the expert's opinion. *Crawford* itself states that the Confrontation Clause ‘does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted.’ [Citations.]” (*People v. Thomas, supra*, 130 Cal.App.4th 1202, 1210.) Such testimony is not barred by the Sixth Amendment and *Crawford* because the hearsay statements “were not offered to establish the truth of the matter asserted, but merely as one of the bases for an expert witness's opinion.” (*Ibid.*; *People v. Cooper* (2007) 148 Cal.App.4th 731, 747.)

The trial court did not abuse its discretion when it found Woessner was qualified to testify as the prosecution's gang expert, and Woessner's expert testimony had a proper foundation and was admissible.

## **II. Substantial evidence for the gang special circumstance and enhancements.**

Defendant contends there is insufficient evidence as a matter of law to support the section 190.2, subdivision (a)(22) gang special circumstance found true as to count I, first degree murder of Hodges, and the section 186.22, subdivision (b) gang enhancements found true as to counts II, III, and IV, the premeditated attempted murders of Vandergriff, Ellison, and Caldwell.

The substantial evidence standard of review applies to the substantive offenses, the section 190.2 special circumstance, and the section 186.22, subdivision (b) gang enhancement. (*People v. Maury* (2003) 30 Cal.4th 342, 396; *People v. Cain* (1995) 10 Cal.4th 1, 39; *People v. Augborne* (2002) 104 Cal.App.4th 362, 371.) "Our review of the sufficiency of the evidence is deferential. We review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence--that is, evidence which is reasonable, credible, and of solid value--such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.] We focus on the whole record, not isolated bits of evidence. [Citation.] We presume the existence of every fact the trier of fact could reasonably deduce from the evidence that supports the verdict. [Citation.] If the verdict is supported by substantial evidence, we accord due deference to the verdict and will not substitute our evaluations of the witnesses' credibility for that of the trier of fact. [Citation.]" (*People v. Killebrew* (2002) 103 Cal.App.4th 644, 660 (*Killebrew*); *Frank S., supra*, 141 Cal.App.4th 1192, 1196.) We apply the same standard to convictions based largely on circumstantial evidence and the reasonable inferences therefrom. (*People v. Ferraez* (2003) 112 Cal.App.4th 925, 930 (*Ferraez*); *People v. Rodriguez* (1999) 20 Cal.4th 1, 11.)

Defendant has not challenged the sufficiency of the evidence as to his convictions for first degree murder of Hodges and the premeditated attempted murders of Vandergriff, Ellison, and Caldwell, and we note there is overwhelming evidence to support these convictions. Defendant waited in the vicinity of the parking lot and paced back and forth, and Simington believed defendant was about to carjack him. When Simington asked defendant if he was coming for him, defendant said no and that he ““came for them.”” Defendant fired directly into SUV’s passenger compartment as it was stopped at the curb. Ellison heard gunshots fired from his left side, looked to his left, and saw defendant standing at the SUV’s window, about two feet away. Vandergriff also looked toward the sound of the gunshots and saw “the guy standing there, shooting,” and “fire coming out of a gun.” Vandergriff, who was the driver, was hit in the arm. Hodges, who was sitting in the left rear seat, was fatally wounded in the head and neck, and the shots were fired from left to right at a slightly downward angle. Ellison, who was sitting next to Hodges in the right rear seat, was shot in the stomach. Defendant’s convictions for first degree murder and premeditated attempted murder are clearly supported by the evidence. (See, e.g., *People v. Martinez* (2003) 113 Cal.App.4th 400, 412-414.)

While defendant has not challenged the sufficiency of the evidence as to the substantive offenses, he contends there is no evidence to support the jury’s findings on the special allegations that he committed the offenses for the benefit of the Westside Crips. We begin with section 190.2, subdivision (a)(22), which sets forth the special circumstance which, as applicable to count I, mandates a sentence of life without possibility of parole for a defendant guilty of first degree murder as follows:

“The defendant intentionally killed the victim while the defendant was an active participant in a criminal street gang, as defined in subdivision (f) of Section 186.22, and the murder was carried out to further the activities of the criminal street gang.”

Section 186.22, subdivision (f) states that a criminal street gang “means any ongoing organization, association, or group of three or more persons, whether formal or informal, having as one of its primary activities the commission of one or more of the criminal acts enumerated [in section 186.22, subdivision (e)], having a common name or common identifying sign or symbol, and whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity.”

Section 186.22, subdivision (b)(1) sets forth the enhancement imposed for counts II, III, and IV, premeditated attempted murders of Vandergriff, Ellison, and Caldwell, and it states:

“[A]ny person who is convicted of a felony committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members, shall, upon conviction of that felony, in addition and consecutive to the punishment prescribed for the felony or attempted felony of which he or she has been convicted, be punished [with a sentence enhancement] . . .” (§ 186.22, subd. (b)(1).)

To prove the gang enhancement, “the prosecution must prove that the crime for which the defendant was convicted had been ‘committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members.’ [Citations.] In addition, the prosecution must prove that the gang (1) is an ongoing association of three or more persons with a common name or common identifying sign or symbol; (2) has as one of its primary activities the commission of one or more of the criminal acts enumerated in the statute; and (3) includes members who either individually or collectively have engaged in a ‘pattern of criminal gang activity’ by committing, attempting to commit, or soliciting *two or more* of the enumerated offenses (the so-called ‘predicate offenses’) during the statutorily defined period. [Citations.]” (*Gardeley*, *supra*, 14 Cal.4th at pp. 616-617, italics in original.)

“[S]pecific intent to *benefit* the gang is not required. What is required is the ‘specific intent to promote, further, or assist in any criminal conduct by gang members....’” (*People v. Morales* (2003) 112 Cal.App.4th 1176, 1198, italics in original (*Morales*).) Gang membership alone cannot prove the requisite specific intent. (*Gardeley, supra*, 14 Cal.4th at p. 623.)

As explained in issue I, *ante*, the subject matter of the culture and habits of street gangs meets the criteria for the admissibility of expert opinion because such evidence is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact. (*Gardeley, supra*, 14 Cal.4th at p. 617; *Frank S., supra*, 141 Cal.App.4th at pp. 1196-1197.) Where an expert witness has disclosed sufficient knowledge of the subject to entitle his opinion to go to the jury, the question of the degree of his knowledge goes more to the weight of the evidence than its admissibility. (*People v. Bolin* (1998) 18 Cal.4th 297, 322.)

“In general, this court and the Courts of Appeal have long permitted a qualified expert to testify about criminal street gangs when the testimony is relevant to the case.” (*People v. Gonzalez* (2006) 38 Cal.4th 932, 944.) A gang expert’s testimony is admissible on the size, composition or existence of a gang; gang turf or territory; an individual defendant’s membership in, or association with, a gang; the primary activities of a specific gang, motivation for a particular crime, generally retaliation or intimidation; whether and how a crime was committed to benefit or promote a gang, rivalries between gangs; gang-related tattoos; gang graffiti and hand signs; and gang colors or attire. (*Killebrew, supra*, 103 Cal.App.4th at pp. 656-657.)

“Expert testimony may also be premised on material that is not admitted into evidence so long as it is material of a type that is reasonably relied upon by experts in the particular field in forming their opinions. [Citations.] Of course, any material that forms the basis of an expert’s opinion testimony must be reliable. [Citation.] For ‘the law does not accord to the expert’s opinion the same degree of credence or integrity as it does the

data underlying the opinion. Like a house built on sand, the expert's opinion is no better than the facts on which it is based.' [Citation.] [¶ ] So long as this threshold requirement of reliability is satisfied, even matter that is ordinarily *inadmissible* can form the proper basis for an expert's opinion testimony. [Citations.]" (*Gardeley, supra*, 14 Cal.4th at p. 618, italics in original.)

"Generally, an expert may render opinion testimony on the basis of facts given 'in a hypothetical question that asks the expert to assume their truth.' [Citation.]" (*Gardeley, supra*, 14 Cal.4th at p. 618.) "A gang expert may render an opinion that facts assumed to be true in a hypothetical question present a 'classic' example of gang-related activity, so long as the hypothetical is rooted in facts shown by the evidence. [Citation.]" (*People v. Gonzalez* (2005) 126 Cal.App.4th 1539, 1551, fn. 4.) "Otherwise admissible expert opinion testimony which embraces the ultimate issue to be decided by the trier of fact is admissible. [Citation.] This rule, however, does not permit the expert to express any opinion he or she may have. [Citation.]" (*Killebrew, supra*, 103 Cal.App.4th at p. 651.)

Defendant contends Woessner's testimony was legally insufficient to support the jury's findings on the gang special circumstance and enhancements. Defendant complains Woessner's opinions were not supported by "any outside source of information" and he failed to connect the shooting to any benefit for the gang. Defendant argues there was no evidence the victims were members of the Eastside Crips, that they had any prior conflicts with defendant and the Westside Crips, and the only evidence to support the special allegations was Woessner's general opinion that "gang members in general are known to shoot people, often in retaliation."

Defendant is correct that a gang expert's testimony alone is insufficient to find an offense is gang related. (*Ferraez, supra*, 112 Cal.App.4th at p. 931.) "[T]he record must provide some evidentiary support, other than merely the defendant's record of prior offenses and past gang activities or personal affiliations, for a finding that the *crime* was

committed for the benefit of, at the direction of, or in association with a criminal street gang.” (*People v. Martinez* (2004) 116 Cal.App.4th 753, 762, italics in original.)

However, the entirety of the record provides the requisite evidentiary support. The parties stipulated that the Westside Crips was a criminal street gang within the meaning of section 186.22, thus eliminating the necessity for the prosecution to introduce evidence on that issue. On appeal, defendant does not challenge the sufficiency of the evidence that he was a member of the Westside Crips, which was based on his prior contacts with law enforcement officers and his own trial admission that he was a member and trying to leave the gang. As we explained in section I, *ante*, Officer Woessner was properly permitted to testify about the nature, culture, and activities of the Westside Crips, particularly as to the manner in which members gain respect by committing violent acts and intimidating civilians and rival gang members. Woessner described defendant’s numerous tattoos, which included a semi-automatic handgun and the phrases “Young BG Hogg,” “Baby Hoggz,” and “Gone in the head, no screws,” and testified such tattoos were associated with the Westside Crips and meant “this is an individual within that gang who is willing to do work for that gang” by committing crimes. In addition, defendant’s sister testified that the day before the shooting, she saw defendant obtain a weapon from “Little Diesel,” and Woensser explained that Clarence “Little Diesel” Wandick was a known member of the Westside Crips.

Ellison’s cell phone had photographs of Ellison and Hodges throwing Eastside gang signs, and Ellison admitted there were “[q]uite a few” members of his family who were members of the Eastside Crips. Ellison also admitted that he knew defendant in junior high school. At trial, defendant admitted that he walked around the apartment buildings and tried to find the right place to buy drugs, and he watched another person walk up to the apartment and knock on the door. Defendant also admitted he thought the people in the SUV were associated with the Eastside Crips but did not explain how he came to that conclusion. However, there is strong circumstantial evidence that defendant

could have seen Ellison as he walking around the apartment building, recognized him from prior contacts as being associated with the Eastside Crips, and decided to check out the other occupants of the SUV. Indeed, Simington testified that just before the shooting started, the man in the blue shirt said he “‘came for them.’”

Defendant argues there was no evidence the gunman shouted a gang name or that “any other gang-related identity was broadcast before, during or after the crime.” While neither Simington nor the victims heard the gunman shout any gang slogans or saw him flash gang signs during the shooting, defendant’s conduct immediately after the shooting provides direct evidence of his intentions. Defendant got back into his car and told Julia to drive to a house in the Lowell Park area, which was the stronghold for the Westside Crips. Defendant then called someone on Julia’s cell phone and said: “East down alright cuz’ bye.” At trial, defendant admitted he made the call and he thought the occupants of the SUV were Eastside Crips.

There is overwhelming evidence that defendant lingered around the apartment complex and fired multiple shots directly into the SUV. Ellison, the only person who got out of the SUV and walked around the area, was associated with the Eastside Crips and had prior contact with defendant. Woessner explained that defendant’s statement immediately after the shooting—“East down alright cuz’ bye”—showed that he felt compelled to immediately tell someone that he had shot members of the Eastside Crips and the shots hit their target, and he shared that information in order to gain respect. Such evidence supported Woessner’s opinion testimony in this case. (Cf. *People v. Albarran* (2007) 149 Cal.App.4th 214, 227 [aside from expert’s opinion testimony, no independent evidence to support finding that offenses were committed to benefit the gang, when there was no evidence of “gang members bragging about their involvement in the crimes . . .”].)

Defendant contends the court improperly permitted Woessner to testify about matters which were in the province of the jury, as to whether the murder and attempted murders were committed for the benefit of the Westside Crips. However, Woessner’s

opinion testimony was admissible even if it encompassed, to some extent, the ultimate issue in the case. (*People v. Valdez*, *supra*, 58 Cal.App.4th at p. 506; *People v. Olquin*, *supra*, 31 Cal.App.4th at p. 1371.) Moreover, opinion testimony about “motivation for a particular crime, generally retaliation or intimidation” and “whether and how a crime was committed to benefit or promote a gang” are appropriate subjects for a gang expert. (*Killebrew*, *supra*, 103 Cal.App.4th at p. 657.) Woessner’s explanation about the activities of gang members and how the commission of violent crimes creates intimidation and earns respect for them among their colleagues and rivals, “was not tantamount to an opinion of guilt or . . . that the enhancement allegation[s] were] true, for there were other elements to the allegation[s] that had to be proved.” (*People v. Valdez*, *supra*, 58 Cal.App.4th at p. 509.)

Defendant argues Woessner lacked personal and/or expert knowledge to offer an opinion in this case, the mere fact of defendant’s membership in the Westside Crips was insufficient to prove the gang allegations, and there is no substantial evidence as a matter of law to support the gang allegations. (AOB 27, 28) Defendant’s argument is based on two cases: *Killebrew*, *supra*, 103 Cal.App.4th 644 and *People v. Ramon* (2009) 175 Cal.App.4th 843 (*Ramon*). These cases are clearly distinguishable from the instant case.

In *Killebrew*, several other gang members were traveling together in three cars, and a weapon was found in one of the cars; defendant was seen in the vicinity of the cars and the prosecution argued he had been in one of the vehicles earlier that evening. (*Killebrew*, *supra*, 103 Cal.App.4th at p. 659.) An expert testified to his opinion, based on hypothetical questions, that when “one gang member in a car possesses a gun, every other gang member in the car knows of the gun and will constructively possess the gun.” (*Id.* at p. 652.) Defendant was convicted of conspiracy to possess a handgun with a gang enhancement. (*Id.* at pp. 647, 658.)

*Killebrew* reversed the jury’s finding on the gang enhancement and held the expert’s testimony regarding the defendant’s subjective knowledge and intent, which was

the only evidence to establish the elements of the gang enhancement, exceeded “the type of culture and habit testimony found in the reported cases.” (*Killebrew, supra*, 103 Cal.App.4th at pp. 654, 658.) The expert improperly “testified to the subjective *knowledge and intent* of each occupant in each vehicle. Such testimony is much different from the *expectations* of gang members in general when confronted with a specific action.” (*Id.* at p. 658, italics in original.) The expert’s testimony “did nothing more than inform the jury how [the expert] believed the case should be decided. It was an improper opinion on the ultimate issue and should have been excluded.” (*Ibid.*)

In *Ramon*, this court found insufficient evidence to support the specific intent prong of the gang enhancement. Defendant was a known gang member, he was arrested while driving a stolen vehicle in his gang’s territory, and he was with a fellow gang member. A loaded, unregistered firearm was under the driver’s seat. Defendant was charged with receiving a stolen vehicle, possession of a firearm by a felon and by an active gang member, and carrying a loaded firearm in public, with gang enhancements as to all counts. (*Ramon, supra*, 175 Cal.App.4th at pp. 846-848.) The prosecution’s gang expert testified one of the primary activities of defendant’s gang was to steal cars, and defendant could have conducted numerous crimes, and spread fear and intimidation, by driving a stolen vehicle and having an unregistered firearm within his gang’s territory. (*Id.* at pp. 847-848.) In response to a hypothetical question which mirrored the facts of the case, the expert concluded defendant’s crimes would have benefited his gang. (*Ibid.*)

*Ramon* vacated the gang enhancements and found the gang expert’s speculative testimony was the only evidence to support the inference that defendant committed the offenses with the specific intent to promote, further, or assist his gang’s criminal conduct. “The People’s expert simply informed the jury of how he felt the case should be resolved. This was an improper opinion and could not provide substantial evidence to support the jury’s finding. There were no facts from which the expert could discern whether [the defendant and his colleague] were acting on their own behalf the night they were arrested

or acting on behalf of [their gang]. While it is possible the two were acting for the benefit of the gang, a mere possibility is nothing more than speculation. Speculation is not substantial evidence. [Citation.]” (*Ramon, supra*, 175 Cal.App.4th at p. 851.)

In contrast to the speculative evidence in *Killebrew* and *Ramon*, the court in *Ferraez, supra*, 112 Cal.App.4th 925, found substantial evidence to support the defendant’s conviction for the substantive offense of active participation in a criminal street gang (§ 186.22, subd. (a)) based on evidentiary support for the gang expert’s testimony. In *Ferraez*, defendant was arrested for possession for sale and admitted being a gang member, admitted he received permission from another gang to sell drugs in that area, but claimed he was selling drugs for his personal benefit and not for his own gang. The prosecution’s gang expert testified to his opinion that, based on a hypothetical identical to the facts of the case, defendant intended to sell drugs for the benefit of, or in association with, the gang, and the gang’s reputation would be enhanced through drug sales and proceeds. He was convicted of possession for sale with a gang enhancement, and the substantive gang offense in violation of section 186.22, subdivision (a). (*Ferraez, supra*, 112 Cal.App.4th at pp. 927-929.)

*Ferraez* rejected defendant’s argument that the expert’s testimony was the only evidence in support of the gang allegations because the expert’s testimony was “coupled with other evidence from which the jury could reasonable infer the crime was gang related,” particularly the fact that defendant admitted he was a gang member and received permission to sell drugs in another gang’s territory, which constituted circumstantial evidence of his intent. (*Ferraez, supra*, 112 Cal.App.4th at p. 931.)

Defendant contends the gang allegations in this case must be reversed, as they were in *Killebrew* and *Ramon*, because Woessner’s opinion testimony in this case was based on pure speculation and lacked any evidentiary support. In contrast to *Ramon* and *Killebrew*, however, there was the factual support for Woessner’s opinion testimony and his response to the hypothetical questions which mirrored the facts of this case, which

provided circumstantial evidence of defendant's motive and intent. Defendant obtained the gun from another member of the Westside Crips, he lingered around the apartments and saw someone associated with the Eastside Crips, he admittedly fired multiple shots into the SUV at very close range, he told his sister to drive to the stronghold of the Westside Crips after the shooting, he called someone to report that he had shot and badly wounded someone from the Eastside Crips, and he admitted at trial that he thought the occupants of the SUV were associated with the Eastside Crips. Indeed, the facts of this instant case are even stronger than the facts found sufficient in *Ferraez*.

Defendant next contends Woessner's "unsupported" expert testimony was insufficient to support the gang allegations, and this court should follow the interpretation of section 186.22 as interpreted in *Briceno v. Scriber* (9th Cir. 2009) 555 F.3d 1069 (*Briceno*). In *Briceno* and *Garcia v. Carey* (9th Cir. 2005) 395 F.3d 1099 (*Garcia*), the Ninth Circuit "held that the specific intent requirement of section 186.22, subdivision (b) is not satisfied by evidence of a defendant's gang membership alone, and instead requires some evidence, aside from a gang expert's 'generic testimony,' that supports an inference that the defendant committed the crime "with the specific intent to facilitate other criminal conduct by the [gang]." [Citations.] Among other things, according to the Ninth Circuit, the statute requires evidence describing "what criminal activity of the gang was . . . intended to be furthered" by the crime. [Citations.]" (*People v. Vasquez* (2009) 178 Cal.App.4th 347, 353.)

While *Ramon* and *Killebrew* held that an expert's testimony, by itself, may be insufficient to support gang allegations, "numerous California courts of appeal" have rejected the Ninth Circuit's attempt in *Briceno* and *Garcia* "to write additional requirements into the statute. [Section 186.22] provides an enhanced penalty where the defendant specifically intends to 'promote, further, or assist in any criminal conduct by gang members.' There is no statutory requirement that this 'criminal conduct by gang members' be distinct from the charged offense, or that the evidence establish specific

crimes the defendant intended to assist his fellow gang members in committing. [Citation.]” (*People v. Vazquez, supra*, 178 Cal.App.4th at p. 354.) “By its plain language, the statute requires a showing of specific intent to promote, further, or assist in ‘any criminal conduct by gang members,’ rather than *other* criminal conduct. [Citation.]” (*People v. Romero* (2006) 140 Cal.App.4th 15, 19, italics added in original; see also *People v. Hill* (2006) 142 Cal.App.4th 770, 774.)

We thus conclude there is substantial evidence to support the jury’s true findings on the gang special circumstance for count I, and the gang enhancements for counts II, III, and IV. Woessner’s testimony “was quite typical of the kind of expert testimony regarding gang culture and psychology that a court has discretion to admit.” (*People v. Gonzalez, supra*, 38 Cal.4th 932, 945.) Woessner’s opinion testimony was “coupled with other evidence from which the jury could reasonable infer the crime was gang related,” based on defendant’s association with the Westside Crips, his statements to Simington just before the shooting, his cell phone call immediately after the shooting, and his admission that he thought the occupants of the SUV were Eastside Crips. (*Ferraez, supra*, 112 Cal.App.4th at p. 931.) While the evidence of defendant’s intent may have been circumstantial, “it was still evidence supporting [defendant’s] conviction. The hypothetical facts presented to the gang expert were properly rooted in the evidence presented at trial. [Citation.]” (*Id.* at p. 930.)

### **III. Sentencing issues**

The parties raise two issues as to whether the court imposed an unauthorized sentence, based on its imposition of a firearm enhancement for count IV, and its failure to impose a firearm enhancement for count I.

#### **A. Count IV**

In count II, III, and IV, defendant was charged and convicted of the premeditated attempted murders of Vandergriff, Ellison, and Caldwell. As to those counts, it was

further alleged that defendant was a principal who personally discharged a firearm causing great bodily injury, pursuant to section 12022.53, subdivisions (d) and (e).

The jury found the firearm allegations true as to counts II and III, premeditated attempted murders of Vandergriff and Ellison, who both suffered serious gunshot wounds. The jury found the firearm allegation not true as to count IV, premeditated attempted murder of Caldwell, who jumped out of the SUV when the shooting started and was not wounded.

Defendant contends, and respondent concedes, the court improperly imposed an enhancement for the firearm allegation attached to count IV, because the jury found that enhancement not true. The enhancement must be stricken and defendant's sentence corrected.

**B. Count I.**

As to count I, defendant was convicted of first degree murder of Hodges, and the jury found true the gang special circumstance, the gang enhancement, and the firearm enhancement, that defendant was a principal in the offense, and at least one principal intentionally and personally discharged and personally used a firearm in the commission of the offense, and proximately caused great bodily injury or death, within the meaning of section 12022.53, subdivisions (d) and (e)(1).

The probation report stated the firearm enhancement as to count I should be stayed because section 12022.53, subdivisions (d) and (e)(1) requires "a gang enhancement in order to be valid," and while a gang enhancement was found true for count I, the element of the gang enhancement "was already used to increase the punishment" for count I based on the gang special circumstance, so that "attempting to use it again" for the firearm enhancement "would result in dual use."

The sentencing court apparently followed the probation report's recommendations. As to count I, the court sentenced appellant to life without parole, plus consecutive terms of 25 years for the firearm enhancement, and a term for the gang enhancement, with the

terms for both enhancements stayed pursuant to section 654. The court also imposed five years for the prior serious felony conviction, and one year for the prior prison term enhancement. As to each of the counts II, III, and IV, attempted murder, the court imposed terms of 14 years to life, plus 25 years to life for the firearm enhancements, stayed the gang enhancements, and added a five-year term for the prior serious felony conviction. The court stayed the term and enhancements imposed for count V. Defendant's aggregate term was life in prison without possibility of parole for count I, plus an indeterminate term of 117 years to life, and a determinate term of 21 years.

In a footnote in its brief, respondent declares the court's decision to stay the firearm enhancement for count I was incorrect because defendant personally discharged the firearm. Respondent does not cite any authorities in support of this assertion aside from the language of section 12022.53, subdivision (e), and respondent does not request this court to correct the sentence. Appellant's reply brief acknowledges respondent's statement about the firearm enhancement, but he does not address the validity of the court's sentencing decision. Instead, appellant argues this court is not required to correct the sentence because respondent did not file an appeal, raise the matter as a separate issue, or cite to any authorities in support of its assertion about the firearm enhancement for count I.

We first note that when a sentence is in excess of the court's jurisdiction or in violation of law, it is considered an unauthorized sentence. (*People v. Scott* (1994) 9 Cal.4th 331, 354 & fn. 17.) "[T]he 'unauthorized sentence' concept constitutes a narrow exception to the general requirement that only those claims properly raised and preserved by the parties are reviewable on appeal. [Citations.]" (*Id.* at p. 354.)

A court "acts in 'excess of its jurisdiction' and imposes an 'unauthorized' sentence when it erroneously stays or fails to stay execution of a sentence under section 654. [Citations.]" (*People v. Scott, supra*, 9 Cal.4th at p. 354, fn. 17.) "'The failure to impose or strike an enhancement is a legally unauthorized sentence subject to correction'

[citation], even if the correction results in a harsher punishment [citations].” (*In re Renfrow* (2008) 164 Cal.App.4th 1251, 1254.)

As to the merits of the sentencing issue, section 12022.53, subdivision (b) through (d) imposes enhancements on defendants who personally use a firearm during the commission of certain enumerated offenses. As to count I, first degree murder, the jury found true the section 12022.53, subdivision (d) enhancement, that defendant “personally and intentionally” discharged a firearm and “proximately caused great bodily injury . . . or death, to any person other than an accomplice,” which carries a term of 25 years to life.

Section 12022.53, subdivision (e)(1) states the firearm enhancement shall apply to any person who is a principal in the commission of the offense, and the person also violated section 186.22, subdivision (b), the gang enhancement, and any principal committed the act described in section 12022.53, subdivision (d). Section 12022.53, subdivision (e)(2) limits the imposition of firearm and gang enhancements and states:

“An enhancement for participation in a criminal street gang . . . shall not be imposed on a person in addition to an enhancement imposed pursuant to this subdivision, *unless the person personally used or personally discharged a firearm in the commission of the offense.*” (Italics added.)

“While a section 12022.53 subdivision (e)(1) allegation expands the gun enhancement’s reach to cover unarmed gang members, subdivision (e)(2) operates in the opposite way by exempting *unarmed* gang members from the gang enhancement’s provisions.” (*People v. Gonzalez* (2010) 180 Cal.App.4th 1420, 1425, italics added.)

As applied to the instant case, the probation report apparently relied upon the provisions of section 12022.53, subdivisions (e)(2), when it stated that the court could not impose both the gang special circumstance and the firearm enhancement for count I. This assertion was incorrect.

“In a case where section 186.22 has been found to be applicable, in order for section 12022.53 to apply, it is necessary only for a principal, not the accused, in the commission of the underlying felony to personally use the

firearm; *personal* firearm use by the accused is not required under these specific circumstances. However, as a consequence of this expanded liability under section 12022.53, subdivision (e), the Legislature has determined to preclude the imposition of an additional enhancement under section 186.22 in a gang case unless the accused *personally* used the firearm.” (*People v. Salas* (2001) 89 Cal.App.4th 1275, 1281-1282, italics in original.)

Thus, a defendant who “*personally* uses or discharges a firearm in the commission of a gang-related offense is subject to *both* the increased punishment provided for in section 186.22 and the increased punishment provided for in section 12022.53.” (*People v. Gonzalez, supra*, 180 Cal.App.4th at p. 1425, italics in original.)

The limitation of section 12022.53, subdivision (e)(2) was not applicable in this case since it was undisputed that defendant personally discharged a firearm and fired the fatal shots at Hodges. The court should not have stayed the indeterminate term of 25 years to life for the 12022.53, subdivision (d) enhancement, and the section 654 stay should be lifted.

### **DISPOSITION**

The stay of the Penal Code section 12022.53, subdivisions (d) and (e) enhancement imposed as to count I is lifted. The Penal Code section 12022.53, subdivisions (d) and (e) enhancement imposed for count IV is stricken. In all other respects, the judgment of conviction and sentence are affirmed. The trial court is directed to prepare and serve as appropriate an amended abstract of judgment.

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Poochigian, J.

WE CONCUR:

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Vartabedian, Acting P.J.

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Hill, J.